(19,641.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 541.

DANIEL R. KENDALL, APPELLANT,

vs.

THE AMERICAN AUTOMATIC LOOM COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 28, 1905.

1 [SEAL.] The President of the United States of America to the American Automatic Loom Company, Greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America, for the southern district of New York, in the second circuit, in equity, on the first Monday of January, A. D. 1905, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Daniel R. Kendall and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, on the 13th day of December, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America, the one hundred and twenty-ninth.

JOHN A. SHIELDS, Clerk.

MERRILL & ROGERS,
Solicitors for Complainant.

The defendant is required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of January, 1905, or the bill will be taken *pro confesso* against it.

J. A. S., Clerk.

2 I hereby certify, that on the 13th day of December, 1904, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant The American Automatic Loom Company at No. 901 Broadway, N. Y. city, N. Y. by exhibiting to Joseph H. Emery, as treasurer of said company the within original, and at the same time leaving with him a copy thereof, and at the same time and place left with him a copy of the bill of complaint in this suit.

WM. HENKEL,
United States Marshal, Southern District of New York.

Dated December 14th, 1904.

U. S. circuit court, southern district of New York. Filed Dec. 14, 1904. John A. Shields, clerk.

3 Circuit Court of the United States, Southern District of New York.

DANIEL R. KENDALL, Plaintiff,
against
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant. } In Equity.

To the honorable the judges of the circuit court in and for the southern district of New York:

The plaintiff, your orator, Daniel R. Kendall, complains of the defendant and for his cause of action respectfully shows unto the court:

First. That the plaintiff is a citizen of the United States, and a resident and citizen of the city, county and State of New York, and of the southern district of New York, and is, and since the 24th day of May 1898, has been, a stockholder of said defendant company, owning and holding four thousand (4,000) shares of the stock of the said company.

Second. Your orator further complains and says that the defendant is, and at all the times herein mentioned was, a stock corporation organized and existing under the laws of the State of West Virginia, with a capital stock of five million (5,000,000) dollars, consisting of shares of the par value of ten (10) dollars each, and was incorporated to engage in the business of manufacturing and selling looms and weaving machinery, and to carry on the business of weaving and making woven fabrics of all kinds, and by its charter
4 of incorporation was to have its principal office or place of business in the city, county and State of New York.

Third. Your orator further shows unto your honors, upon information and belief, that the principal office and place of business of the said corporation is, and at all times has been, located in the city and southern district of New York, and all of its regular business has been conducted in and from the said city, and a considerable part of the assets of said company are and have been in said southern district of New York.

Fourth. Upon information and belief, your orator further shows that at the present time and for a long time past the assets of the defendant, at a fair and reasonable value, are and have been wholly insufficient to pay its debts, and the liabilities of the defendant over and above its assets as aforesaid are and have been for some time upwards of ten thousand (10,000) dollars.

Fifth. Your orator further shows, upon information and belief, that the said defendant company was organized as aforesaid for the purpose of acquiring the right to make, use and vend a certain automatic loom attachment in the United States of America, Canada and the Republic of Mexico; that a corporation organized under the laws of the State of Nebraska, known and designated as the

Automatic Loom Company, owned the patent or patents for the said automatic loom attachment, or the English or European rights therein, and upon the organization of the said defendant company, its board of directors valued the American rights in the automatic loom attachment as aforesaid at the sum of three million (3,000,000) dollars or more, and issued the stock of the defendant company in that sum therefor, and acquired the said rights.

5 Sixth. Your orator further shows, upon information and belief, that one Joseph H. Emery, who is a resident and citizen of the city, county and State of New York and of the southern district of New York, was one of the promoters and organizers of the said defendant corporation, and is, and at all times has been, since its organization, a director and the treasurer of the said defendant corporation.

Seventh. Your orator further alleges that one Fanny C. Emery, who is the wife of the said Joseph H. Emery, and who lives with him, informed your orator that the automatic loom attachment aforesaid had passed beyond the state of experiment and had become an assured success; that a model machine had been constructed, which worked perfectly and was then entirely ready for the market, and that nothing remained to be done but to manufacture the machines and to sell them; that your orator was so impressed with these representations that he asked the said Fanny C. Emery whether she could get him some stock of the defendant company, and she thereupon stated to your orator that she thought so, but not at the price which some of plaintiff's friends had paid for their stock, viz: one dollar a share; that shortly thereafter the said Fanny C. Emery informed your orator that she could not get stock at less than one dollar and a half per share, and thereupon plaintiff purchased the said stock at said price and paid therefor.

On the 24th day of May 1898, he purchased thirty-five hundred (3500) shares and paid the said Fanny C. Emery therefor the sum of five thousand two hundred and fifty (5,250) dollars. On the 21st day of December, 1898, he purchased five hundred (500) shares and

6 paid the said Fanny C. Emery therefor seven hundred and fifty (750) dollars; and your orator further alleges on information and belief that each and every of said statements of the said Fanny C. Emery was false and fraudulent, and known to her to be false when made, and was made with intent to mislead your orator, and to induce him to buy said stock and to pay therefor, and your orator believed said statements so made and was induced thereby to purchase said stock as aforesaid and to pay for the same; that the said defendant company did not at the time aforesaid own a patent which had passed the stage of experiment; that it has issued all or nearly all of its capital stock for the American rights in a patent automatic loom attachment for which no machine had then been constructed which was a commercial success or has yet been constructed which was or is in successful operation; upon information and belief that the said Fanny C. Emery had obtained an option

through her said husband, Joseph H. Emery, or otherwise, to buy stock of the defendant corporation at twenty-five cents a share, or less, and that the stock sold to plaintiff was secured by the said Fanny C. Emery or the said Joseph H. Emery at the price of twenty-five cents a share, or less, and that the stock of the American Automatic Loom Company could, at the time of the sale aforesaid, be purchased in large quantities for twenty-five cents a share, or less, and that the same had little or no market or intrinsic value.

Your orator further alleges that he was ignorant of the real condition of the defendant company at the time of the purchase of the said stock aforesaid, and that he does not know whether the said stock was sold to him by the said Fanny C. Emery individually or in co-partnership with her said husband, Joseph H. Emery,
7 or whether the said Joseph H. Emery participated with the said Fanny C. Emery in the whole or any part of the proceeds of said sales to your orator, or whether the said stock so purchased was the treasury stock of the defendant corporation for which the said Fanny C. Emery or the said Joseph H. Emery, jointly or separately, were the agents in making the said sales.

Eighth. Your orator further alleges, upon information and belief, that the said defendant corporation has expended considerable sums, amounting to more than two thousand (2,000) dollars, in constructing and endeavoring to improve the said automatic loom attachment, and in making a model thereof, and in obtaining the issuance of further patents thereon, the exact location of which models and patents are at present unknown to your orator; but your orator avers upon information and belief that the reasonable value of the said model and patents and tangible assets of said defendant corporation exceeds the sum of two thousand (2000) dollars.

Ninth. Your orator further shows this court, upon information and belief, that the said director Joseph H. Emery, has taken entire and unlawful charge of the defendant in managing its business, and disposing of the assets and property of the defendant without the consent of this plaintiff or of any of the stockholders, and not in accordance with the laws of this State or of the State of West Virginia applicable thereto, and all of the directors of the defendant without authority of law or the consent of the stockholders have ceased to use their powers and abdicated their offices as directors.

Tenth. Your orator further shows this court, upon information and belief, that the said Joseph H. Emery as treasurer, and the board of directors of the defendant corporation have failed
8 and refused to pay any and all of the taxes levied and assessed against the defendant corporation, either in the State of West Virginia or in the State of New York, and that by reason thereof the defendant corporation is indebted to the State of West Virginia in the sum of more than five thousand (5000) dollars, by reason of which the attorney general, and other proper officials of the State of West Virginia, *has* instituted suit against this corporation by the due and personal service of process upon the defendant

corporation within the said State of West Virginia to have a decree of forfeiture of its charter and franchises and to dissolve the said corporation entered in the circuit court of Kanawha county, in the State of West Virginia, and that the said representatives of the defendant corporation have failed and neglected to appear in said action of dissolution or to defend the same, and are in default in said action, by reason of which a final decree of dissolution of said corporation is expected to be entered in said court at the January term, 1905, and in the event of said decree being entered as aforesaid, before the trial of this action, the plaintiff hereby gives notice to the defendant of his intention to produce it in evidence.

Eleventh. Your orator further shows this court, upon information and belief that the directors of the said corporation have failed and refused to call the annual meeting of the stockholders of the defendant corporation, as required by the charter of the said corporation and by its by-laws and by the laws of the State of West Virginia since the 11th day of May, 1900, and on or about the 17th day of April, 1904, this plaintiff duly served upon the said defendant corporation and upon the said Joseph H. Emery as treasurer of
9 the said defendant corporation, a written demand that the annual meeting of the stockholders of the defendant corporation be called for the second Tuesday of May 1904, as provided in the said defendant's by-laws and other laws applicable to the said defendant corporation, with which demand the said corporation and the said Emery refused and neglected to comply, and that this plaintiff on the said 7th day of April, 1904, further demanded in writing, by service as aforesaid, an inspection of the list of stockholders of the defendant corporation to which he was entitled under the laws of the State of West Virginia, and under the by-laws of the said defendant corporation, and the said demand was also refused as aforesaid.

Twelfth. Your orator further shows this court, upon information and belief, that if the property of the said corporation can be preserved under the protection of the court a considerable part of the value of the said property, which would otherwise be lost, would be preserved for the creditors and stockholders of the company.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

And that a receiver of the said corporation and of all of its assets and property of every description that is within this State,
10 or elsewhere, shall be appointed by the decree of this court and likewise during the pendency of this suit with the usual

powers and authority of receivers in such cases to take, receive and care for said property, and to make the directors of the said defendant account therefor, and that the defendant company may be required to turn over and convey to said receiver all of its said property; that all of said property be sold and realized upon, and the debts and liabilities of the said defendant be liquidated and paid off, and the surplus, if any, be distributed according to law, and that an injunction may be granted both by the final decree and pending this suit restraining any interference with the said receiver or property, and for such other and further or different relief as may be just and proper.

May it please your honors to grant unto your orator not only a receivership and a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said defendant company, commanding it on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

MERRILL & ROGERS,
Solicitors for Complainant and of Counsel.

Office and post office address, 31 Nassau street, borough of Manhattan, New York city.

11 STATE OF NEW YORK, }
County of New York, } ss.:

Daniel R. Kendall, being duly sworn, deposes and says: That he is the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

DAN'L R. KENDALL.

Subscribed and sworn to before me this 8th day of December, 1904.

JOHN C. BARR,
[SEAL.] Notary Public, Kings Co.

Certificate filed in N. Y. Co.

(Endorsed:) Circuit court of United States, southern district of New York.—Daniel R. Kendall, plaintiff, against The American Automatic Loom Co., defendant.—Bill of complaint.—Merrill & Rogers, attorneys for plaintiff, 31 Nassau street, New York city.—U. S. circuit court, southern district of New York. Filed Dec. 13, 1904, John A. Shields, clerk.

12 At a stated term of the United States circuit court for the southern district of New York, held in the post office building in the city of New York, on the 21st day of December, 1904.

DANIEL R. KENDALL, Complainant,
vs.
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant. } In Equity.

On reading and filing the special appearance of the defendant by Messrs. Simpson, Werner & Cardozo, its solicitors, for the sole purpose of questioning the jurisdiction of the court, and of moving to set aside the service of the writ of subpœna and the bill of complaint heretofore made herein, and for no other purpose, it is

Ordered, that the said special appearance be and the same is hereby entered and filed herein.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) Circuit court of United States, southern district of New York.—Daniel R. Kendall against The American Automatic Loom Company.—Order.—Simpson, Werner & Cardozo, solicitors for defendant, 52 Broadway, Manhattan, New York.—U. S. circuit court, southern district of New York. Filed Dec. 21, 1904, John A. Shields, clerk.

13 Circuit Court of the United States for the Southern District of New York.

DANIEL R. KENDALL, Complainant,
vs.
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant. } In Equity.

Please take notice, that the above named defendant appears specially in this suit, for the sole purpose of questioning the jurisdiction of the court, and of moving to set aside the service of the writ of subpœna, and the bill of complaint heretofore made herein, and for no other purpose; and that we are retained as its solicitors for that purpose and no other.

Dated New York, December 19, 1904.

SIMPSON, WERNER & CARDOZO,
Solicitors for Defendant,
52 Broadway, New York City, Borough of Manhattan.

To Messrs. Merrill & Rogers, solicitors for complainant, 31 Nassua St., N. Y.

(Endorsed:) Circuit court of the United States, southern district of New York.—Daniel R. Kendall, against The American Automatic Loom Co.—Notice of special appearance.—Simpson, Werner &

Cardozo, solicitors for defendant, 52 Broadway, New York.—A copy of the within paper received Dec. 20/04. Merrill & Rogers, attorneys for plaintiff.—U. S. circuit court, southern district of New York, Filed Dec. 21, 1904, John A. Shields, clerk.

14 Circuit Court of the United States for the Southern District of New York.

DANIEL R. KENDALL, Complainant,
against
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant. } In Equity.

Please take notice, that on the annexed affidavit of Joseph H. Emery, and the bill of complaint and writ of subpœna herein, a motion will be made by the undersigned, at a stated term of this court, to be held at the post office building in the borough of Manhattan, in the city of New York, on the 23rd day of December, 1904, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order setting aside the service of the writ of subpœna and bill of complaint herein, which was attempted to be made on or about the 13th day of December, 1904, and extending the defendant's time to appear generally herein, until five days after the hearing and decision of this motion, and for such other and further order or relief in the premises as may be just and proper.

Dated, December 19, 1904.

SIMPSON, WERNER & CARDOZO,
Solicitors for the Defendant, The American Automatic Loom Company, Appearing Specially for the Purpose of Questioning the Jurisdiction of the Court and of Setting Aside the Aforesaid Service and for no Other Purpose, 52 Broadway, New York City, Borough of Manhattan.

To Messrs. Merrill & Rogers, solicitors for complainant, 31 Nassua street, N. Y.

15 Circuit Court of the United States for the Southern District of New York.

DANIEL R. KENDALL, Complainant,
against
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant. } In Equity.

STATE OF NEW YORK,
County of New York, } ss.:

Joseph H. Emery, being duly sworn, deposes and says: On the 13th day of December, 1904, a copy of the bill of complaint herein,

and of the writ of subpœna requiring the defendant to answer the said bill of complaint, was served upon me in the city of New York. I am informed and believe that the reason why service was attemped to be made upon the defendant corporation in the manner aforesaid is because I have been the treasurer of said defendant. The domicil and residence of the defendant is in the State of West Virginia. The said defendant now appears especially for the sole purpose of questioning the jurisdiction of the court, and of moving to set aside the said attempted service.

The defendant, The American Automatic Loom Company, was incorporated under the laws of the State of West Virginia in or about the month of March, 1898. The purpose of its incorporation was the development, perfection and promotion of a self-feeding loom attachment, which gives to an ordinary loom a continuous supply of filling thread. It was the owner of divers patents which it was believed would accomplish that result; it has never manufactured merchandise; it has never made a sale; and it has never
16 engaged in the transaction of the business for which it was incorporated. It has no assets or property in the State of New York; it has no office or place of business in said State. Those of its officers who reside in said State are not here officially or as representing any business or interests of the said corporation.

When the said corporation was first formed, the meetings of its stockholders and directors were held at the office of the company's counsel, in the Mills building No. 35 Wall street, New York city. This continued at intervals during the greater part of the year 1898. After that time, and until August 10, 1901, meetings were held irregularly at any place where accommodations could be secured. Thus, on December 27, 1898, a special meeting of the directors was held at the Murray Hill hotel, where one of the chief stockholders resided; on June 20, 1898, a meeting of the directors was held at No. 479 Fifth avenue; on February 23, 1900, a special meeting of the directors was held at the Murray Hill hotel; on March 13, 1900, a meeting of the directors was held at the Murray Hill hotel; on March 14, 1900, a meeting of the stockholders was held at No. 45 Broadway; on March 20, 1900, an adjourned meeting of the stockholders was held at the same place; on April 16, 1900, a meeting of the directors was held at the Murray Hill hotel; on May 11, 1900, a meeting of the stockholders was held at No. 45 Broadway; on October 1, 1900, a meeting of the directors was held at the Murray Hill hotel; on February 3, 1901, a meeting of the directors was held at the Murray Hill hotel; and on August 10, 1901, a meeting of the stockholders was held at No. 45 Broadway.

17 Since August 10, 1901, there has been no meeting either of the stockholders or of the directors. On the date last mentioned, the stockholders were informed that the company had no funds with which to pay the franchise taxes which were due to the State of West Virginia, and no funds have since been provided for that purpose. The company, since the date aforesaid, has transacted

no business, has maintained no office in this State, and an action has been commenced by the State of West Virginia against it to forfeit and terminate its corporate franchise.

The sole assets of the company are two automatic looms, the tools and machinery employed in the making thereof and its patents. The looms, machinery and tools are in Attleboro, Massachusetts. They are kept in the machine-shop of the Frank P. Mossberg Company at that place. Mr. Mossberg has made divers attempts to improve the looms. The letters patent are also in Mr. Mossberg's possession, and are in Attleboro, Massachusetts. The company has no bank account, no office force, and no employees. It has never reached the stage of the active transaction of business, and such assets as it possesses are beyond the jurisdiction of this court.

It is not true that I have assumed the complete management of the company's affairs, or that I have undertaken to dispose of its assets. Whatever assets it has received are still owned by it, and are subject to whatever disposition the board of directors may determine to make. So far as the management of the business has been concerned, there has been thus far no business to manage. The inability of the company to place its looms upon the market has resulted in the abandonment of any attempt to transact business and in the virtual extinction of corporate life.

I am advised and believe that under the laws of the State
18 of West Virginia, it was not the duty of the treasurer to call a meeting of the stockholders, and that under section 41 of chapter 53 of the Code of West Virginia, such notice should be called either by the board of directors, or by stockholders holding one-tenth of the capital stock.

The provision of the certificate of incorporation that said "corporation shall keep its principal office or place of business at the city of New York, in the county of New York, and State of New York," has not been complied with; and the corporation has no place of abode within this jurisdiction.

I am advised and believe that the attempted service of the writ of subpœna was and is ineffectual and illegal, and that the same should be set aside.

JOSEPH H. EMERY.

Sworn to before me this 19th day of December, 1904.
W. T. LAING,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) Circuit court of United States, southern district of New York.—Daniel R. Kendall, against The American Automatic Loom Co.—Affidavit and notice of motion.—Simpson, Werner & Cardozo, attorneys for defendant, 52 Broadway, Manhattan, New York.—A copy of the within paper received Dec. 19/04. Merrill & Rogers, attorneys for plaintiff.—U. S. circuit court, southern district of New York, Filed Dec. 19, 1904, John A. Shields, clerk.

19 Circuit Court of the United States, Southern District of New York.

DANIEL R. KENDALL, Complainant,
against
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant. } In Equity.

STATE OF NEW YORK,
County of New York, } ss.:

Daniel R. Kendall, being duly sworn, says:

I am the complainant in this suit, and have read the affidavit of Joseph H. Emery, verified the 19th day of December, 1904.

On January 25th, 1904, my attorneys, Messrs. Merrill & Rogers, wrote and mailed to the defendant company the letter annexed hereto, and received in reply the letter also annexed hereto, dated February 6th, 1904, signed by Joseph H. Emery.

On the 7th day of January, 1904, my said attorneys wrote the defendant company requesting the date of the last meeting of the stockholders and a copy of the treasurer's report, and received in reply the letter of January 12th, 1904, signed by said Joseph H. Emery.

In January, 1903, I communicated with Mr. Joseph H. Emery as to the condition at that time of the defendant company as to certain persons who, Mr. Emery said, were looking into the subject of buying the control of the defendant company and as to what work the defendant company was doing in perfecting its looms or models at Attleboro, Massachusetts, and what progress the defendant
20 company was making in its business. In reply to this I received from the said Emery the letter annexed hereto, dated January 20th, 1903, which is signed by the said Emery.

In the spring of 1902 I had several communications with the said Emery concerning the business of the defendant company, its progress in perfecting the model. I received at that time from said Emery as treasurer of the defendant company the letter annexed hereto, dated April 3rd, 1902, which is signed by the said Emery.

I own a certified copy of the certificate of incorporation of the defendant company, and have examined same, and it appears therein that each and every one of the incorporators of the defendant company resided in New York city, New York.

The said Emery, in his affidavit, sets forth numerous meetings of the directors and stockholders of the defendant company, each and all of which occurred in the city, county and State of New York, and I verily believe that the defendant company has had no office in the State of West Virginia, nor has held any of its meetings there, nor has it transacted any business there. I verily believe that all of the business and meetings of the directors and stockholders of the said company that have been held during its entire existence

have been held in the city, county and State of New York, and that each and all of its directors have been residents of said city, county and State.

I therefore request, in case this court desires further evidence on this point, that I may have an opportunity to examine the said Emery under oath as to what business the corporation has
21 done in this State and in the State of West Virginia, where it was incorporated.

DAN'L R. KENDALL.

Sworn to before me this 23rd day of December, 1904.

JOHN C. BARR,
[L. S.] Notary Public, Kings Co.

Certificate filed in N. Y. Co.

22 JANUARY 12, 1904.

DEAR SIRS: I beg to acknowledge receipt of yours of the 7th inst.

The last annual meeting of the stockholders of the American Automatic Loom Company was held on May 11, 1900. The time fixed for the next annual meeting of stockholders is the first Tuesday in May.

If I can find the treasurer's report made at the last annual meeting which was held, I shall send you a copy of same during the current week.

Very truly yours, J. H. EMERY.

Mess. Merrill & Rogers, attorneys for Daniel R. Kendall, stockholder, 31 Nassau street, New York city.

(Copy.)

23 JAN. 25, 1904.

American Automatic Loom Company, Mr. Joseph H. Emery, treasurer.

DEAR SIR: Referring to your favor of recent date, in which you state that the annual meeting has not regularly been held, we now beg to ask of you on behalf of our client, Mr. Daniel R. Kendall, a copy of the annual report of directors required by the corporation laws of West Virginia, which should show the property in funds belonging to the corporation, the estimated value thereof, etc., as provided in section 46 of general regulations; and also a list of stockholders and their places of residence, as in said law further provided.

Kindly let us have the information in question as soon as possible, and so oblige

Yours truly, MERRILL & ROGERS,
Att'ys for Daniel R. Kendall, Stockholder.

(Copy.)

24 NEW YORK, February 6, 1904.

Messrs. Merrill & Rogers, 31 Nassau street, New York city.

GENTLEMEN: I duly received your letter of the 25th ult. in which, in behalf of your client, Mr. Daniel R. Kendall, you requested a copy of the annual report of the directors of the American Automatic Loom Company, under the provisions of section 46 of the general regulations of the Corporation Laws of West Virginia.

In reply thereto I beg to state that, as there has been no annual meeting of the stockholders since the date referred to in my previous letter, it has not been possible that the board of directors should report to the stockholders at the annual meeting concerning the condition of the corporation. I am advised that, as treasurer of the company, I have no authority to prepare a statement which would bind the board of directors.

I am, dear sirs,
Very truly yours, J. H. EMERY.

(Copy.)

25 The Union League Club, New York.

JAN. 20, 1903.

Mr. Daniel R. Kendall.

DEAR SIR: The people I spoke about are now looking into our patents. In the meantime we are continuing with our work at Attleboro.

Yours truly, J. H. EMERY.

(Copy.)

26 Lord & Taylor, New York, Hosiery Department.

APRIL 3D, '02.

Daniel R. Kendall, Esq., Metropolitan Club, city.

DEAR MR. KENDALL: Replying to your communication of current date, I would say that we did visit the manufacturer on Saturday last, and found the new loom for which we have been waiting finished, but not in condition to weave. Some parts had to be smoothed a little before they could begin — make cloth. As all the parts were made by hand this was to be expected. They hope to have the machine in condition to give a practical test the coming Saturday.

However, I received the following letter this morning from which it appears doubtful:

"We are progressing with the loom and have done a little weaving, but as yet it is not toned up to perfection, and while I am in hopes to have it ready for exhibition by Saturday, I am unable to state positively at this writing in regard to this."

However, it is only a question of a few days when I expect this machine will be ready for our inspection. It is far ahead of anything which has been produced and I believe it is a success.

The other loom which they made previous to this one is running and last Saturday ran as high as 210 picks, making cloth as good as any made. I trust this new one will be all right.

I will report to you on my return, or if you care to go up and see the machine in operation, I would be glad to have you accompany me.

Yours truly, J. H. EMERY.

(Copy.)

27 (Endorsed:) U. S. circuit court, southern dist. N. Y.—Daniel R. Kendall, plaintiff, against The American Automatic Loom Co. defendant.—Affidavit in opposition.—Merrill & Rogers, attorneys for plaintiff, 31 Nassau street, New York city.—Motion granted. Dec. 29, 1904. E. H. Lacombe, U. S. C. J. U. S. circuit court, southern district of New York, Filed Dec. 29, 1904, John A. Shields, clerk.

28 At a stated term of the circuit court of the United States for the southern district of New York, held in the Post Office building, in the city of New York, on the 5th day of January, 1905.

Present: Hon. E. Henry Lacombe, circuit judge.

DANIEL R. KENDALL, Complainant,
vs.
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant.

The above-named defendant, having appeared specially herein, for the sole purpose of questioning the jurisdiction of the court, and of moving to set aside the service of the bill of complaint and of the writ of subpœna requiring the defendant to answer said bill of complaint, which service was attempted to be made herein on or about the 13th day of December, 1904; and the said motion having duly come on for argument; upon reading and filing the bill of complaint herein, the writ of subpœna requiring the defendant to answer the same, the notice of special appearance, the affidavit of Joseph H. Emery, verified the 19th day of December, 1904, and the notice of motion for an order setting aside the service of the said writ of subpœna and of the said bill of complaint, and for such other and further order or relief as might be just and proper;

29 and upon reading and filing the affidavit of Daniel R. Kendall, verified the 23rd day of December, 1904; after hearing Mr. Benjamin N. Cardozo, of counsel for the defendant in support of the said motion, and Mr. Alfred Holbrook, of counsel for the complainant, in opposition thereto; now, on motion of Messrs. Simpson, Werner & Cardozo, attorneys for the said defendant, appearing specially for the purpose of said motion only, it is

Ordered, that the said motion be and the same hereby is granted; and it is further

Ordered, that the service of the bill of complaint and of the writ of subpœna herein made by delivery thereof to Joseph H. Emery, treasurer of the defendant, on or about the 13th day of December, 1904, be and the same hereby is set aside and declared null and void.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York—Daniel R. Kendall, against The American Automatic Loom Co.—Order setting aside service of writ of subpœna with notice of settlement.—Simpson, Werner & Cardozo, attorneys for defendant, 52 Broadway, New York.—Gentlemen: Take notice that the within order will be presented for settlement to Mr. Justice Lacombe, at his chambers in the Post Office building in the borough of Manhattan, city of New York, on the 4th day of January, 1905, at 10:30 a. m.—Yours, &c., Simpson, Werner & Cardozo, def't's solicitors 52 Broadway N. Y.—To Merrill & Rogers, Esqs., complainant's 30 solicitors, 31 Nassau St. N. Y.—A copy of the within paper received Dec. 31, 1904. Merrill & Rogers, complainant's solicitors.—U. S. circuit court, southern district of New York, Filed Jan. 5, 1905, John A. Shields, clerk.

31 United States Circuit Court, Southern District of New York.

DANIEL R. KENDALL, Complainant,
against
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant.
} Petition on Appeal.

To the honorable the judges of the circuit court of the United States for the second circuit:

Daniel R. Kendall, the complainant above named, considering himself aggrieved by the order made and entered herein on the 5th day of January, 1905, does hereby appeal from said order to the United States Supreme Court for the reasons specified in the assignment of errors which is filed herein, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made duly authenticated may be sent to the United States Supreme Court.

Dated New York, February 17th, 1905.

MERRILL & ROGERS,
Att'ys for Complainant, 31 Nassau Street,
Borough of Manhattan, New York City.

The foregoing claim of appeal is hereby allowed.
Dated New York, February 18, 1905.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed :) United States circuit court, southern district of New York.—Daniel R. Kendall, complainant, against The American Automatic Loom Company, defendant.—Petition on appeal.—Merrill & Rogers, solicitors for complainant, 31 Nassau St., New York city.—Received. Feb. 18, 1905, Simpson, Werner & Cardozo, appearing specially for this motion.—U. S. circuit court, southern district of New York, Filed Feb. 18, 1905, John A. Shields, clerk.

32 The Supreme Court of the United States.

DANIEL R. KENDALL, Plaintiff-Appellant,
against
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant-Respondent.

Assignment of Errors.

Now, on this 23rd day of January, 1905, comes the said Daniel R. Kendall by Merrill & Rogers his attorneys and says: That in the record and proceedings in the above entitled matter there is manifest error to wit:

I. That the matters set out in the moving papers of the defendant are not sufficient to sustain the order setting aside the service of process in this suit.

II. That the United States circuit court for the southern district of New York has jurisdiction over the defendant corporation by reason of the service of the writ of subpœna made by the United States marshal herein.

III. That the principal office of the said corporation is by its charter fixed and located in the said southern district of New York, by reason of which service of process upon the treasurer of the said defendant who resides in said district is sufficient to confer jurisdiction upon the said circuit court.

IV. That the circuit court of the United States for the southern district of New York erred in setting aside the said service of process.

33 Wherefore said Daniel R. Kendall prays that the order of the said circuit court of the United States for the southern district of New York be reversed.

MERRILL & ROGERS,
Att'ys for Plaintiff-Appellant, 31 Nassau Street,
Borough of Manhattan, New York City.

(Endorsed :) The Supreme Court of the United States.—Daniel R. Kendall, plaintiff, against The American Automatic Loom Co., defendant.—Assignment of errors.—Merrill & Rogers, attorneys for plaintiff, 31 Nassau street, New York city.—U. S. circuit court, southern district of New York, Filed Jan. 23, 1905, John A. Shields, clerk.

34 National Surety Company.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

DANIEL R. KENDALL, Appellant,
vs.
AMERICAN AUTOMATIC LOOM COMPANY, Appellee.
} Bond for Damages and Costs.

Know all men by these presents, that the National Surety Company, having an office and principal place of business at No. 346 Broadway, in the city of New York, county and State of New York, is held and firmly bound unto the above named American Automatic Loom Company, in the sum of two hundred and fifty ($250.) dollars, to be paid to the said The American Automatic Loom Company for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal, and dated the 18th day of February in the year of our Lord one thousand nine hundred and five.

Whereas, the above named Daniel R. Kendall hath prosecuted an appeal to the Supreme Court of the United States to reverse the order rendered in the above entitled suit, by the judge of the circuit court of the United States for the southern district of New York.

Now, therefore, the condition of this obligation is such, that if the above named Daniel R. Kendall shall prosecute his appeal to effect, and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NATIONAL SURETY COMPANY,
[SEAL.] By JOEL RATHBONE,
Res. Vice President.

Attest:

RICHARD J. MORIARTY,
Res. Ass't Secretary.

Sealed and delivered, and taken and acknowledged this 18th day of Feb. 1905, before me,

BELLE F. JAIS,
Notary Public for the County of N. Y., 47.

Certificate filed in Kings, Westchester, Richmond & Queens counties.

35 Copy of By-Law.

Be it remembered, that at a regular meeting of the board of directors of the National Surety Company, duly called and held on the 6th day of Feb. 1900, a quorum being present, the following by-law was adopted:

"ARTICLE XIII, SEC. 1. All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, "shall be signed by the president, the vice-president, the second "vice-president, a resident vice-president, or an attorney in fact, "and, except when signed by an attorney in fact, shall have "the seal of the company affixed thereto, duly attested by the "secretary, assistant secretary or a resident assistant secretary. The "vice-president, second vice-president and resident vice-presidents "shall each have authority to sign such instruments whether "the president be absent or incapacitated or not; and the assistant "secretary and resident assistant assistant secretaries shall each have "authority to seal and attest such instruments, whether the secretary be absent or incapacitated or not. All such instruments "executed as herein provided shall be as binding upon the company "as if the same were signed by the president, duly sealed and attested by the secretary."

CITY AND COUNTY OF NEW YORK, *ss:*

I Richard J. Moriarty, res. ass't secretary of the National Surety Company, have compared the foregoing by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and the seal of the company at the city of New York, this 18th day of February, 1905.

[SEAL.] RICHARD J. MORIARTY,
Res. Ass't Secretary.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 18th day of February, 1905, before me personally appeared Joel Rathbone res. vice president of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he is the res. vice president of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as res. vice president of said company by

like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720 of New York Session Laws of 1893. And the said Joel Rathbone further said that he is acquainted with Richard J. Moriarty and knows him to be the res. ass't secretary of said company; that the signature of the said Richard J. Moriarty subscribed to the said instrument is in the genuine handwriting of the said Richard J. Moriarty and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Joel Rathbone res. vice president.

BELLE F. JAIS,
Notary Public for the County of N. Y., 47.

Certificate filed in Kings, Westchester, Richmond & Queens counties.

[Endorsed:] —— court Bond for damages and costs. Surety: National Surety Company. I approve of the within bond, and of the sufficiency of the surety. —— ——.

36 (Endorsed:) Circuit court.—Daniel R. Kendall, appellant, *vs.* American Automatic Loom Co. appellee.—Bond for damages and costs. Surety: National Surety Company.—I approve of the within bond and of the sufficiency of the surety. E. S. Lacombe, U. S. circuit judge, U. S. circuit court, southern district of New York, Filed Feb. 18, 1905, John A. Shields, clerk.

37 By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To the American Automatic Loom Company, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at Washington, D. C., on the 21st day of February, 1905, pursuant to a petition on appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Daniel R. Kendall is the appellant and you are the appellee, to show cause, if any there be, why the final order in said petition on appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan in the city of New York, in the district and circuit above named, this 18th day of February, in the year of our Lord one thousand nine hundred and five, and of the Independence of these United States the one hundred and twenty-ninth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States
for the Southern District of New York,
in the Second Circuit.

(Endorsed:) United States Supreme Court, Daniel R. Kendall *vs.* The American Automatic Loom Company.—Citation.—Received Feb. 18, 1905, Simpson, Werner & Cardozo, appearing specially for this motion.—U. S. circuit court, southern district of New York, Filed Feb. 18, 1905, John A. Shields, clerk.

38 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to thirty-seven inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled Daniel R. Kendall, compl't-appellant, against The American Automatic Loom Company, def't-appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 20th day of February in the year of our Lord one thousand nine hundred and five and of the Independence of the said United States the one hundred and twenty-ninth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, Clerk.

[Endorsed:] United States Supreme Court. Daniel R. Kendall, compl't-appellant, *vs.* The American Automatic Loom Company, def't appellee. Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No. 19,641. S. New York C. C. U. S. Term No. 541. Daniel R. Kendall, appellant, *vs.* The American Automatic Loom Company. Filed February 24th, 1905. File No. 19,641.